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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 443

HUGHES TOOL COMPANY AND RAYMOND M. HOLLIDAY, PETITIONERS

v.

TRANS WORLD AIRLINES, INC.

No. 501

HUGHES TOOL COMPANY, PETITIONER

v.

TRANS WORLD AIRLINES, INC., THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD AS AMICUS CURIAE

INTEREST OF THE CIVIL AERONAUTICS BOARD

The Civil Aeronautics Board has an obvious interest in this litigation to the extent that it involves a determination of the jurisdiction and responsibilities of the Board under the Federal Aviation Act. We accordingly address ourselves to the question whether

the complaint and the counterclaims raise issues which lie within the agency's exclusive jurisdiction or which the courts should refer to it for initial consideration. Our conclusion is that the court of appeals correctly held (1) that none of the issues raised by the complaint is either within the Board's exclusive jurisdiction or should be referred to the Board, and (2) that the issues raised by the second counterclaim (but none of those in the other counterclaims) are within the Board's exclusive province. We also believe that it would be helpful to the Court to state our views as to the legal effect of the Board's orders permitting Hughes Tool Company ("Toolco") to acquire control of Trans World Airways, Inc. ("TWA") and authorizing certain transactions between those companies; the Board's position is that those orders did not provide any antitrust or other immunity for the acts upon which TWA's complaint is based. We take no position on any of the other issues in the case, such as whether the complaint states a cause of action under the antitrust laws; whether TWA could prove its allegations in the absence of the default judgment; and whether, in the circumstances, the entry of a default judgment on the complaint or the dismissal of the other counterclaims with prejudice was proper.

STATEMENT

In view of the parties' full presentation of the facts, we limit this Statement to a brief description of the relevant Board orders, the complaint and the decisions below.

1. THE BOARD'S ORDERS

In 1944, the Board, acting under Section 408 of the Federal Aviation Act, approved the acquisition of control of TWA by Toolco through ownership of approximately 45 percent of the carrier's stock (*Transcontinental & W.A., Control by Hughes Tool Co.*, 6 C.A.B. 153). The Board ruled that the stock acquisition gave Toolco control over TWA and that Toolco was engaged in a phase of aeronautics because it had the right to purchase a substantial fleet of aircraft, at least a part of which might be held for resale, 6 C.A.B. at 155–156. The Board also found that Toolco's control of TWA would have no adverse effect upon the public interest. It expressed concern, however, that "TWA might be forced, through the control exercised by Hughes Tool, to purchase more [aircraft] than the economic operations of TWA require" (*id.* at 156). While stating that this possibility was remote (*ibid.*), the Board conditioned its approval of control by limiting transactions between the companies to those "involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000" (*id.* at 158). In 1950, the Board approved an arrangement under which Toolco increased it holdings of TWA stock to approximately 73 percent (*Transcontinental & W.A., Further Control by Hughes Tool Co.*, 9 C.A.B. 381; 12 C.A.B. 192), subject to the 1944 limitation upon intercompany transactions (12 C.A.B. at 193).

Since 1944 the Board, upon application by TWA and Toolco, has entered various orders modifying the basic orders of approval to permit intercompany transactions in excess of the dollar limitations imposed by the foregoing condition (A–172—227). These orders permitted Toolco to sell or lease equipment to TWA and to participate in the financing of TWA's acquisition of equipment. No hearings were held or adversary pleadings filed when such orders were entered. The Board found that each transaction was in the public interest and, in each order since the end of 1956, that the proposed transaction or transactions did "not violate the original intent of the restriction imposed upon transactions between TWA and Toolco."[1] Nearly all of the orders state further that the approval of the transaction is not a determination of the reasonableness of the transaction for rate-making purposes.[2] The last modification order, entered in December 1960 (A–218—227), authorized a financing arrangement (involving a voting trust) under which two lending institutions have exercised actual control over TWA's management since 1961.[3]

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[1] The quoted language, or variants thereof, is found at A–191, 193, 198, 200, 202–203, 205, 208, 210, 213. One order in June 1960, specifically stated that the Board's finding to that effect was made on "the basis of the application and the representations contained therein", (A–213).

[2] A–178, 180, 182, 184, 185, 191, 194, 198, 201, 203, 206, 208, 210, 214, 217, 227.

[3] In addition to these orders dealing with specific transactions, the Board entered an order in 1956 instituting an investigation to determine whether a "proposed change in Toolco's activities in the field of aeronautics"—entry into the business of manu-

2. THE PLEADINGS

In 1961, TWA filed a complaint against Toolco, Howard Hughes (Toolco's sole stockholder) and Raymond M. Holliday (a Toolco officer) (A–1—30), charging that the defendants had violated Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act, and also that they had maliciously and willfully injured the business of TWA. The antitrust claims are based upon the defendants' alleged misuse of their power to control TWA's acquisition of aircraft, including particularly jet-powered aircraft, with the aim of making Toolco the sole supplier of aircraft to TWA. The complaint alleges that in effectuating this purpose the defendants prevented TWA from acquiring any jet-powered aircraft for a substantial period (A–12—13); and that from 1955 to 1960 they barred TWA from obtaining the financing necessary for acquisition of such aircraft, and allowed only debt financing or such equity financing as would increase Toolco's equity position in the carrier (A–14—15). TWA alleged that it was damaged principally by its failure timely to acquire necessary aircraft, in particular to acquire jet-powered aircraft in 1958–1960, and by its failure to obtain financing on more advantageous terms than were available when it finally was permitted to do so and to acquire additional aircraft in December 1960 (A–

facturing and selling jet aircraft—required further Board approval under Section 408 (A–187—189). This investigation was terminated in 1958 after Toolco abandoned the proposed manufacturing project and TWA withdrew its request that the Board approve purchase of Toolco aircraft (A–195—196).

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15, 23—24).[4] As relief on the antitrust claims, TWA sought treble damages, divestiture of Toolco's stock interest in TWA, and an injunction against the defendants' attempting to control or interfere with TWA. Based on these same allegations, TWA also sought damages and injunctive relief for tortious interference with its business (A–28—29).

The defendants Toolco and Holliday filed answers denying the allegations against them, alleging that the complaint did not state a cause of action, and challenging the court's jurisdiction on the ground that the orders of the Civil Aeronautics Board dealing with Toolco's control of TWA immunized the challenged transactions (A–31—40, 144—160). (Hughes was not served and did not file an answer.) Toolco also asserted six counterclaims against TWA and additional defendants. The first five counterclaims—the only ones here involved[5]—alleged that TWA, the financial institutions involved in the voting trust, and the carrier's present management had conspired to prevent Toolco from terminating the voting trust and

[4] It was further alleged that the defendants conspired with others to force TWA to merge with Northeast Airlines on terms unfavorable to TWA, in order to enlarge TWA's aircraft requirements (A–13—14). Plaintiff also alleged that after Toolco agreed in 1960 to put its shares in TWA in a voting trust, in order to finance the acquistion of jets, it continued to try to force TWA to purchase aircraft from Toolco and engaged in a campaign of harassment to frustrate the financing of the jets which TWA sought to acquire (A–17—21).

[5] The sixth counterclaim, not here pertinent, sought interest that TWA owed on a note (A–83). The district court granted summary judgment for TWA on this counterclaim, and the court of appeals affirmed (R. 1436–1437).

thereby acquiring control of the carrier (counterclaim 1, A–40—49); that the financial institutions exercising control over TWA through the voting trust had violated Section 408 of the Federal Aviation Act of 1958 by acquiring such control without Board approval (counterclaim 2, A–49—52); that TWA and the additional defendants had violated the antitrust laws by conspiring to monopolize airline financing, to prevent TWA from acquiring long-term financing from other sources, and to deprive Toolco of its control over the airline by means of the voting trust (counterclaims 3 and 4, A–52—78); and that they had conspired to perpetuate a voting trust in violation of State law (counterclaim 5, A–78—80). Toolco sought injunctive relief on the second counterclaim (charging violation of the Federal Aviation Act) and injunctive relief and damages on the first, third, fourth and fifth counterclaims (A–80—83).

3. THE DECISIONS BELOW

As a result of the failure of Howard Hughes to appear for the taking of his deposition, the district court (1) entered a default judgment in favor of TWA against Toolco and Holliday on the issue of liability; (2) referred the question of damages to a special master and retained for further consideration the issues of divestiture of Toolco's stock interest in TWA and injunctive relief; and (3) dismissed the five counterclaims with prejudice (A–132—137). The court of appeals granted Toolco and Holliday leave to appeal from the interlocutory order granting sum-

mary judgment in favor of TWA on the substantive issues, limited to two questions: (1) whether the district court "lacked jurisdiction" of the treble damage action by reason of primary jurisdiction over these matters "residing in the Civil Aeronautics Board"; and (2) whether the Board's orders authorizing Toolco's control of TWA and the various intercompany transactions constituted a defense to TWA's antitrust claim (R. 1416). In addition, Toolco appealed from the final judgment dismissing the five counterclaims (R. 1416).

The court of appeals held: (1) the Federal Aviation Act had not superseded the antitrust laws with respect to TWA's claims, and those claims were not within the Board's primary jurisdiction (R. 1421–1423); (2) the Board orders did not give Toolco and Holliday immunity for their alleged violations of the antitrust laws (R. 1425–1426); (3) the second counterclaim, charging that the financial institutions had violated Section 408 of the Federal Aviation Act in acquiring control of TWA, raised an issue that was within the Board's exclusive jurisdiction, and the district court therefore should have dismissed that counterclaim for lack of jurisdiction (R. 1432); and (4) the four other counterclaims raised issues not within the Board's jurisdiction, and the district court was justified in dismissing those claims with prejudice because of Hughes' default at the deposition hearing (R. 1431–1436).

DISCUSSION

I

IN NO. 443, THE DISTRICT COURT PROPERLY ENTERTAINED THE COMPLAINT

A. THE FEDERAL AVIATION ACT HAS NOT SUPERSEDED ANTITRUST OR OTHER REMEDIES FOR THE CONDUCT ALLEGED IN THE COMPLAINT

In *Pan American World Airways* v. *United States*, 371 U.S. 296 (the *Panagra* case), this Court held that the Civil Aeronautics Board rather than the courts was to determine "all questions of injunctive relief against the division of territories or the allocation of routes or against combinations between common carriers and air carriers" (p. 310). The Court noted that under the Federal Aviation Act the Board has the power to authorize agreements dealing with these subjects, and that such authorization gives immunity to acts done pursuant thereto; and that the Board also has the power to correct past acts which constituted "unfair * * * practices" or "unfair methods of competition" (pp. 309–310). The Court held that the Federal Aviation Act superseded the antitrust laws with respect to matters "basic in [the Aviation Act's] regulatory scheme" (p. 305), and it therefore directed dismissal of a government complaint seeking injunctive relief against alleged allocation and monopolization of air routes in violation of the Sherman Act.

In *Panagra*, however, the Court recognized that "[w]hile the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, those expressly entrusted to it

encompass only a fraction of the total" (p. 305). It does not "have jurisdiction over every antitrust violation by air carriers" (p. 312). In finding supersession, it emphasized that the Board had power to adjudicate all the substantive issues involved in the antitrust suit and to give all the relief sought there. It pointed out (pp. 305–306, 311) that criminal prosecutions or damage claims—not cognizable by the Board—remain subject to judicial determination. It noted, further, that in a civil case cognizable by a court because the Board could not provide an adequate remedy, the court might refer certain issues to the agency for determination of the basic facts (p. 313, fn. 19).

In sum, the rationale of the holding in *Panagra* that the "narrow questions presented by [the government's] complaint have been entrusted to the Board" (p. 313) was that the Board had comprehensive regulatory authority over the violations charged. This is not so in the present case, however, and the issues raised in the present case therefore "have [not] been entrusted to the Board" for determination.

1. As the court of appeals correctly stated (R. 1422), although there was a "direct" relationship "between the allegedly unlawful activities in *Panagra* and the scope of the Board's powers to deal with such activities * * * in the instant case TWA's complaint alleges transactions which are unrelated to any specific function of the CAB." In *Panagra*, the controversy related to routes and services, which only the Board could authorize and regulate (Secs. 401, 412, 49 U.S.C.

1371, 1382), and restraints "in air transportation or the sale thereof" which were similarly subject to the Board's control (Section 411, 49 U.S.C. 1381). In contrast, the instant controversy concerns alleged improprieties in the management and control of an air carrier which resulted in injury to the carrier itself—a subject as to which the Board does not have similar comprehensive regulatory powers.

The Board considers the fitness of airline management in the process of issuing airline certificates and in proceedings to revoke, suspend or modify certificates (Sec. 401(d), (g), 49 U.S.C. 1371(d), (g)). It is not charged, however, with the day-to-day supervision of the internal affairs of air carriers, and control of an air carrier may be freely transferred without Board consent (with the exception of transfers within Section 408, discussed below). The Federal Aviation Act thus generally leaves to ordinary corporation law the resolution of conflicts between an air carrier's principal stockholder or management and its creditors or minority stockholders.

Section 408 of the Aviation Act (49 U.S.C. 1378) does require Board approval before control of an air carrier may be acquired by another air carrier, by a "person engaged in any other phase of aeronautics," or by persons having other specified transportation interests. It was pursuant to this section that the Board entered its orders approving control of TWA by Toolco, which the Board found to be engaged in another "phase of aeronautics" as a present or potential dealer in aircraft. It approved such control.

subject to a condition which barred substantial dealings between the companies and thereafter authorized specific transactions for the sale or leasing of aircraft. (The effect of these orders is discussed below, pp. 14–18.)

But the Board's power under Section 408 to regulate acquisitions of control of air carriers does not oust the courts of jurisdiction under the antitrust laws to adjudicate controversies that grow out of or relate to the exercise of such control. Section 408 requires the Board to approve only an "acquisition of control"; it does not give the Board continuing responsibility for supervision of a controlling person's management of an air carrier. The Board, to be sure, is empowered to impose conditions upon its approval (Section 408(b)), and it may bar dealings between the parties or, as it did here, reserve Board supervision over designated future transactions. Such conditions are ordinarily limited, as they were here, to specific classes of transactions, and, indeed, the Board may approve unqualifiedly *i.e.*, without imposing any conditions.[6] The Board has no jurisdiction over aircraft dealers or manufacturers as such, and is not generally empowered to regulate the issuance of a carrier's securities or its capital structure, or to specify the aircraft which a carrier can acquire. Indeed, the Board is specifically precluded from inter-

[6] Immunity from the antitrust laws and other legal restraints is afforded to persons affected by Section 408 orders, but only to the extent "necessary" to carry out that which was approved by the Board. (Section 414, 49 U.S.C. 1384.) The immunity provision does not, therefore, broaden the scope of the Board's authority over control relationships within Section 408.

fering with a carrier's choice of equipment (Section 401(e)(4), 49 U.S.C. 1371(e)(4)).

Finally, the Board's remedial powers do not effectively cover the conduct alleged in the complaint. Its authority to enter cease-and-desist orders (Section 411, 49 U.S.C. 1381) is limited to unfair practices committed by an "air carrier * * * in air transportation or the sale thereof", while the complaint seeks relief against persons controlling an air carrier, and asserts unlawful action affecting the sale of aircraft, not air transportation. The Board is not authorized to afford redress in damages for past unlawful transactions. Nor can it prevent the termination of a control relationship by the transfer of control to someone whose acquisition of control does not fall within Section 408. Toolco contends that the Board may reexamine a prior order approving control and cancel it if, upon inquiry, it finds abuses of control which require such corrective action in the public interest (cf. Section 1005(d), 49 U.S.C. 1485(d)). We assume for present purposes that the Board has this power, and that it may also consider a party's past conduct in the exercise of control when passing upon further requests for Section 408 approval. But since the Act does not impose any duty on the Board affirmatively to monitor and supervise all aspects of the control relationship, the Board's limited authority over Section 408 relationships should not of itself serve to oust the courts from jurisdiction.[7] Indeed,

[7] Toolco and Holliday inaccurately cite certain statements in the Board's petition for rehearing in *Trans World Airlines* v. *C.A.B.*, C.A. 2, No. 29,063, as indicating recognition that the

the availability of antitrust or other judicial remedies may be regarded as additional safeguards for the protection of the public interest.

In any event, as the case now stands, the only issue before the Court is the lower courts' jurisdiction to hold petitioners liable in damages,[8] a remedy which, as the Court noted in *Panagra* (371 U.S. at 311), the Board has "no power" to grant. If the complaint is a sufficient one—a question as to which we express no opinion—that remedy is to be fashioned by the courts.

B. THE BOARD'S ORDERS AUTHORIZING TOOLCO'S CONTROL OF TWA AND CERTAIN INTERCOMPANY TRANSACTIONS DID NOT IMMUNIZE THE ALLEGED CONDUCT

Since immunity from the antitrust laws is not "lightly implied", a statutory immunity for specified transactions does not extend to "other types of agreements or restraints." *California* v. *Federal Power Commission*, 369 U.S. 482, 485; *United States* v. *Phil-*

Board has exclusive authority to deal with these matters (Br., p. 83). The quoted statement was directed to the point that the issue of reopening a control proceeding was committed to the Board's discretion, and the court of appeals should not have ordered a Board hearing on the relevance of the antitrust charges to continuation of Toolco's control, without affording the agency the opportunity to consider the need or appropriateness of such hearing. This argument as to the Board's discretion over its own proceedings was not intended to (and does not) suggest supersession of judicial remedies for the antitrust violations alleged in the complaint.

[8] The limited interlocutory appeal below brought up only this question, for while the complaint also sought divestiture and an injunction (A–28–29), grant of such relief is still pending undetermined in the district court (A–136).

adelphia National Bank, 374 U.S. 321; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226–227. The Aviation Act reflects this policy, since the immunity which Section 414 grants for acts done pursuant to Board orders under Section 408 is applicable only "insofar as may be necessary to enable such persons to do anything authorized, approved or required by [the Board's] order."

We submit that neither the Board's orders authorizing Toolco's control over TWA nor its approval of various intercompany transactions provide any immunity for the antitrust violations that TWA alleges. The 1944 and 1950 orders, respectively, approved the acquisition and enlargement of Toolco's control over TWA. But orders authorizing control do not approve prospectively all things that may be done in the exercise of control; and the Board's orders did not permit Toolco to utilize its power as a means of violating the antitrust laws. As the court below summarized TWA's complaint, it charges "the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce" (332 F. 2d at 611). Such conduct plainly did not constitute acts "necessary to enable" Toolco to do "anything authorized [or] approved" by the Board's order.

Similarly, no immunity was conferred by the various orders modifying the basic orders of approval. The control orders permitted only those intercompany transactions that did not involve more than $200 each and an annual total of $10,000—limitations imposed

because of the Board's concern that Toolco might force TWA to purchase more aircraft than its operations required. In waiving this condition for a number of specific purchases and leases of aircraft, the Board passed upon only such matters as the carrier's need for the particular equipment and the reasonableness of the terms of the various financing arrangements as disclosed by the applications. The orders were entered solely on the basis of motions filed by TWA, and without hearings or adversary pleadings. The Board stressed the limited nature of its approvals by pointing out that it was appraising the transactions in the light of the original intent of the restriction in the control order, thus focusing upon whether Toolco was using its control relationship to sell to TWA aircraft not economically justified by its operation. It also stated that it was not passing upon the reasonableness of the transactions for ratemaking purposes. In short, the Board did not purport to approve anything but the specific transactions involved, and the misconduct alleged in the complaint was no more necessary to the consummation of those transactions than it was to the original acquisition of control.

Moreover, many of TWA's charges against Toolco involve the latter's use of its control to prevent TWA from acquiring aircraft from other suppliers and from obtaining the financing necessary to acquire jets. The complaint states that this conduct was the cause of the alleged injuries to the carrier. This restraint upon TWA's activities was, of course,

neither submitted to nor approved by the Board, and it was certainly not necessary to carry out any of the Board's orders.

Toolco and Holliday suggest (Br., p. 74) that the "scope of the exemption granted by the transactional orders must clearly be construed not solely in terms of the transactions themselves, but by the total context in which they were considered by the Board." It asserts that there was substantial material in the Board's files relating to the "Toolco-TWA relationship" (Br., p. 74), such as the carrier's regular reports containing financial and operating statistics, field audits, and the records in various route and rate proceedings (Br., pp. 75–78), all of which, it is said, covered such matters as TWA's equipment and financing needs and sources. From this, Toolco concludes that the Board must have "acted with complete awareness of the implications and consequences of its orders" (Br., p. 78) and must have approved "the pattern of Toolco's involvement in TWA's aircraft acquisitions" (Br., p. 79).

The argument, we submit, is unsound. Apart from the fact that much of the material cited by Toolco postdates most of the so-called "transactional orders," this material neither disclosed nor suggested the existence of the conduct charged in TWA's complaint.[9]

[9] Toolco states in this connection that evidence "relating directly to Toolco's exercise of its control relationship with TWA was presented to the CAB" in the proceeding culminating in the Board's approval of Toolco's acquisition of control of Northeast Airlines (Br., p. 78). But this proceeding took place after all of the orders upon which Toolco relies in claiming

Moreover, even assuming that the Board had more than a general knowledge of Toolco's management of TWA, these materials afford no basis for Toolco's contention that the Board approved more than it purported to approve and impliedly immunized the conduct here in issue. Cf. *United States* v. *Radio Corporation of America*, 358 U.S. 334. The Board's failure to initiate an investigation into Toolco's control relationship may be taken as reflecting the Board's judgment that, at that time and on the facts available to it, Toolco had not misused its control. But that judgment cannot be treated as Board approval of the illegal conduct alleged in the complaint.

Finally, to the extent that the complaint alleges activities subsequent to December 31, 1960, there is another flaw in Toolco's claim of immunity. Since the end of 1960, actual control of TWA has resided not in Toolco but in a voting trust of the stock of TWA owned beneficially by Toolco (Order E–16195, December 29, 1960, A–218). Under any theory, immunity extends only to activities which are necessary to the exercise of approved control. The post-1960 activities with which TWA charges Toolco cannot possibly be so characterized and accordingly can find no shelter of immunity in any of the orders upon which Toolco relies.[10]

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immunity had been issued, and hence is irrelevant to the scope of the immunity conferred by those orders. Moreover, as in the case of all of the material cited by Toolco, there is no indication that this evidence disclosed conduct of the sort alleged in TWA's complaint.

[10] The validity of this proposition—that Toolco's post-1960 conduct cannot be within the immunity afforded by the control

C. THE DOCTRINE OF PRIMARY JURISDICTION DOES NOT REQUIRE A REFERRAL TO THE BOARD OF ANY OF THE ISSUES PRESENTED BY THE COMPLAINT

"The doctrine of primary jurisdiction * * * applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 63–64; cf. *Whitney National Bank* v. *Bank of New Orleans and Trust Co.*, Nos. 26 and 30. This Term, decided January 18, 1965; *Far East Conference* v. *United States*, 342 U.S. 570, 574–575. Under this standard there is no occasion to refer to the Board any of the issues presented by the complaint.

The courts are better qualified than the Board to resolve questions of corporate mismanagement and antitrust violations, and the Board, which has no particular expertise in the field, could only be expected to follow judicial precedent. True, questions might arise in a case such as this which would call for appraisal

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orders—is not affected by the Board's recent ruling that Toolco may terminate the voting trust and resume control without further proceedings under Section 408 (provided it divests itself of control of Northeast Airlines) (see Br., pp. 81–83). The Board held that the Toolco control orders were still legally effective for that purpose. But it recognized that there has been a factual "hiatus" in Toolco's control. Toolco's alleged activities during such hiatus cannot be regarded as protected by the approved control.

of the impact of particular acts upon an air carrier in the light of over-all industry conditions, suitability of equipment, and the like. However, the Board has already considered those specific transactions that were presented to it and, as previously indicated, its orders reflect its conclusion that these transactions, in and of themselves, were not inimical to the public interest. It may also be that, had discovery procedures been completed before the district court, specific issues might have emerged on which a Board determination would have been proper. In the absence of such developments, however, there is no requirement for referral to the Board.

As to the legal issue whether the Board's orders conferred immunity, those orders are part of the record in this case. Whether, and to what extent, they gave Toolco immunity under Section 414 are legal questions appropriate for judicial determination (*McManus* v. *Lake Central Airlines, Inc.*, 327 F. 2d 212, 213 (C.A. 2), certiorari denied, 377 U.S. 943; *River Plate and Brazil Conferences* v. *Pressed Steel Car Co.*, 227 F. 2d 60, 63 (C.A. 2); *Putnam* v. *Air Transport Association*, 112 F. Supp. 885 (S.D.N.Y.)). The Board could not now enter any order that would relieve Toolco from any liability it may already have incurred for past unlawful acts.[11]

[redacted]

[11] In some cases, where judicial injunctions were sought against conduct which could be immunized by agency approval, reference to the agency was directed to assure "protection of the integrity of [its] regulatory scheme" (*United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353; see *Far East Conference* v. *United States*, 342 U.S. 570; *S.S.W. Inc.* v. *Air*

II

IN NO. 501, THE COURT BELOW PROPERLY HELD THAT THE ISSUES RAISED BY THE SECOND COUNTERCLAIM (BUT BY NONE OF THE OTHERS) WERE FOR THE DETERMINATION OF THE BOARD

In No. 501, petitioner Toolco is challenging the dismissal with prejudice of its first, third, fourth and fifth counterclaims. The petitioner accepts the court of appeals holding that its second counterclaim raised issues that are within the exclusive jurisdiction of the Civil Aeronautics Board. Indeed, it relies upon this ruling to urge that because of the close relation between the second counterclaim and the others, the latter should have been dismissed without prejudice. Our comments on No. 501 will be limited to the matter of the Board's jurisdiction.

Toolco's second counterclaim charges that the lending institutions involved in the voting trust, Metropolitan Life Insurance Company and Equitable Life Assurance Society, were engaged in a "phase of aeronautics" within the meaning of Section 408 of the Aviation Act because of their dominance over airline financing; and that their acquisition of control of TWA through the voting trust was a violation of Section 408 because Board approval had not been obtained. The Board is empowered to investigate unlawful acquisitions of control and to take appro-

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Transport Ass'n of America, 191 F. 2d 658 (C.A.D.C.); Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037, 1064–1065). This facet of the primary jurisdiction doctrine is inapplicable here, because, as previously noted, No. 443 involves only petitioners' liability for damages for past conduct.

priate corrective action (Section 408(e)) which may include ordering divestiture of control.[12] In recognition of this authority, Toolco has filed a complaint, now pending before the Board, challenging the lawfulness of the lending institutions' control.[13]

We agree with the court of appeals that the question of the Section 408 violation, presented in the second counterclaim, is a matter to be determined by the Board, and not by a court. The Board not only has complete power to correct past unlawful acquisitions of control, but also to approve such control and, prospectively, to immunize it from the antitrust and other laws. On the principles developed in the *Panagra* case, the Board's comprehensive authority over this matter supersedes "all questions of injunctive relief" against such conduct (371 U.S. at 310). A judicial injunction against the lending institutions' control of TWA, on the ground that they were in violation of Section 408, would directly conflict with a prospective Board order of approval. The Court's statement in *Panagra* is apposite: "If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." 371 U.S. 296 at 310. And since Toolco

[12] Cf. *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115.

[13] The issue raised by the second counterclaim, that the voting trust required Section 408 approval because of the relation of the lending institutions to the airline business, has never been considered by the Board. While the Board's order in December 1960 (A-218—227) contemplated the establishment of the voting trust, its action was limited to modification of the Toolco-TWA control order to the extent necessary to permit the financing arrangements.

sought only injunctive relief against the Section 408 violation (A–81), dismissal of the second counterclaim was clearly correct (cf. 371 U.S. at 313, fn. 19).

The other counterclaims, which are not based on alleged violations of the Federal Aviation Act, involve, in part, issues relating to the voting trust (*e.g.*, conspiracy to compel Toolco to accept the trust, conspiracy to perpetuate it). Basically, however, they present the claim that there was a misuse of dominent financial power which injured Toolco and TWA in violation of the antitrust and State laws (See the Statement, *supra*, pp. 6–7). For the reasons discussed in Point I, claims of this kind are not within the Board's jurisdiction.

Respectfully submitted.

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[14] In lieu of the Solicitor General, who has disqualified himself for personal reasons.

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